Supreme Court, U.S.
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No. 03-960

IN THE

Supreme Court of the United States

GROSS SEED COMPANY,

Petitioner,

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION AND NEBRASKA DEPARTMENT OF ROADS, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR PETITIONER

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Far from demonstrating that the decision below does not merit this Court's review, the briefs in opposition filed by the federal and Nebraska respondents confirm that such review is indeed warranted.

1. At the outset, it should be noted that respondents do not dispute four important points. First, respondents do not dispute that the challenged provisions of TEA-21, DOT's DBE regulations, and Nebraska's DBE program operate on the basis of race and therefore are subject to strict scrutiny. *Cf. Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200, 212-213 (1995) (federal respondents argued that former DOT

program was based on disadvantage, not on race, and thus was subject only to "the most relaxed judicial scrutiny").[1]

Second, it is conceded that, although DOT's DBE regulations required Nebraska to have a DBE program, *see* Neb. Opp. 2 ("NDOR was mandated by DOT and FHWA to implement a DBE program"), and also authorized Nebraska to include race-conscious measures in its program, those same regulations did *not* require Nebraska at any point to look for or find any evidence of discrimination in its construction industry, *see id.* at 5 ("pursuant to 49 C.F.R. Part 26, NDOR was not to look for specific instances of discrimination"). To be clear: DOT's regulations do not require a state, before resorting to racial preferences, to undertake the kind of searching examination that would reveal discrimination within its construction industry. On the contrary, those regulations require every state receiving federal highway funds to have a DOT-approved DBE program—in which the state may use race-conscious measures—whether or not the state has looked for or found evidence of discrimination within its borders.

Third, and relatedly, the Nebraska respondents candidly admit that "NDOR complied specifically with DOT's directive that it was not required to look for specific instances of discrimination in the highway contracting community." Neb. Opp. 6. Thus, "NDOR did not * * * look for specific instances of discrimination since Congress had decided there was discrimination." *Id.* at 5. But if Congress had before it evidence of discrimination in Nebraska, that evidence is not cited by the Nebraska or federal respondents in their oppositions. As discussed below, it is hard to see how the DBE program authorized by Congress, required by DOT, and implemented by Nebraska exclusively within its borders can

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[1] Respondents have not argued that the gender-based provisions of the statute, regulations, and state program are separable from the race-based provisions or subject to less than strict scrutiny.

satisfy strict scrutiny if no one had evidence of discrimination in the state.

Fourth, respondents do not dispute that Nebraska's DBE program caused Gross Seed to lose work solely because of the race of Gross Seed's owners. *See* Pet. 10 (discussing the Brownlee Spur project). In this case, race was not merely one factor among many that counted against Gross Seed—it was the deciding factor. *Compare Gratz* v. *Bollinger*, 123 S. Ct. 2411, 2428 & n.19 (2003) (university's use of race in undergraduate admissions violated Equal Protection Clause where race became the "decisive" factor in practice) *with Grutter* v. *Bollinger*, 123 S. Ct. 2325, 2342 (2003) (permitting use of race as a "plus" factor when giving individualized consideration to law school applicants). Thus, as the DBE program was applied in this case, the Eighth Circuit was quite wrong to say that "race is made relevant in the program, but it is not a determinative factor." Pet. App. 12a.

2. The three questions presented in Gross Seed's petition ask whether TEA-21, DOT's regulations, and the Nebraska DBE program can survive strict scrutiny—"the most demanding test known to constitutional law." *City of Boerne* v. *Flores*, 521 U.S. 507, 534 (1997). Thus, as in *Adarand II*, this case "presents questions of fundamental national importance calling for final resolution by this Court." *Adarand Constructors, Inc.* v. *Mineta*, 534 U.S. 103, 110 (2001) (per curiam). Respondents fail to show that those questions are no longer important.

All agree that, in enacting TEA-21, Congress had to have a "strong basis in evidence" for concluding that the statute's race-based provisions were needed as a remedy for past or present discrimination in the construction industry. Pet. 17; Pet. App. 6a; Fed. Opp. 16-17; Neb. Opp. 10-11. Congress, however, made no findings in TEA-21 that might support the 10% set aside contained in that statute. Strict scrutiny requires more of the legislature before it classifies citizens by

race. *See City of Richmond* v. *J. A. Croson Co.*, 488 U.S. 469, 510 (1989) ("Proper findings * * * are necessary to define both the scope of the injury and the extent of the remedy necessary to cure its effects.") (plurality opinion).[2]

The federal respondents point to "anecdotal evidence" (Fed. Opp. 3) of discrimination offered by individual Members of Congress in floor statements, but this Court has held that such evidence is "of little probative value in establishing identified discrimination" and "has no place in equal protection analysis." *Croson*, 488 U.S. at 500, 501. *See also Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 89 (2000) ("evidence consist[ing] almost entirely of isolated sentences clipped from floor debates and legislative reports" fell "well short of the mark"). Other Members, moreover, took a different view. *See, e.g.*, 144 Cong. Rec. S1400 (1998) ("there is no legislative record to support this racial classification") (statement of Sen. Sessions).[3]

The federal respondents cite more substantial evidence that African Americans encounter greater difficulty obtaining business loans than other business owners (Fed. Opp. 4), but if discrimination by lenders is the primary justification for TEA-21, the statute is simultaneously overbroad and underinclusive: overbroad because construction contract set asides go far beyond the problem of discriminatory lending practices, and underinclusive because such set asides do not in any way redress discrimination against would-be borrow-

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[2] The federal respondents do not help their cause by citing *Nevada Department of Human Resources* v. *Hibbs*, 538 U.S. 721 (2003), and comparing TEA-21 to the Family and Medical Leave Act (Fed. Opp. 20), because, unlike here, Congress at least made some findings in support of the FMLA and, unlike TEA-21, the FMLA treats both sexes and all racial groups equally.

[3] Notably, the federal respondents attempt to distance the Eighth Circuit's decision from the "Appendix" on which the Tenth Circuit heavily relied in *Adarand II*. Fed. Opp. 17.

ers other than construction contractors. *See Builders Ass'n of Greater Chicago* v. *City of Chicago*, 298 F. Supp.2d 725, 741 (N.D. Ill. 2003) ("Goals do not directly impact difficulties in accessing credit. A set-aside does not address discriminatory loan denials or higher interest rates."). Furthermore, the federal respondents do not show that the problems faced by African American business loan applicants also affect (or equally affect) other minority groups and women.

The federal respondents also cite certain "disparity" studies purporting to show "underutilization" of minority-owned firms in government contracting in particular states. Fed. Opp. 4-5 & n.4, 19-20. Assuming *arguendo* that those studies represent probative evidence of discrimination in the studied jurisdictions, such evidence would not warrant the assumption that similar discrimination exists in every state or justify the imposition of federally-mandated programs in all of the 50 states. *See Croson*, 488 U.S. at 505 (presence of discrimination in one jurisdiction cannot be "extrapolat[ed]" to other jurisdictions); *City of Boerne*, 521 U.S. at 532-533 (Religious Freedom Restoration Act "cannot be considered remedial" because of, *inter alia*, the lack of "geographic restrictions" upon RFRA's applicability; in contrast, voting rights provisions upheld in *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966), "were confined to those regions of the country where voting discrimination had been most flagrant"); *Kimel*, 528 U.S. at 90 (report showing pattern of governmental age discrimination in California "insufficient to support Congress' 1974 extension of the [Age Discrimination in Employment Act] to every State of the Union").

Lacking evidence of discrimination in all 50 states—or even anywhere close to 50 states—respondents defend the broad federal mandate of the DOT regulations that all states implement a DBE program by repairing to the Eighth Circuit's statement that "a valid race-based program must be narrowly tailored, and to be narrowly tailored, a *national* program must be limited to those parts of the country where

its race-based measures are demonstrably needed." Pet. App. 8a-9a (emphasis in original). *See* Fed. Opp. 13, 23; Neb. Opp. 11. Here, however, the need for a race-based program in Nebraska has not been demonstrated. As noted above, the Nebraska respondents concede that they did not even look for evidence of discrimination. Neb. Opp. 5-6. And if Congress had before it any evidence of discrimination in Nebraska, petitioner is unaware of that evidence, and respondents do not cite it.[4]

Quite simply, a race-based program cannot be narrowly tailored if it applies to a state or other jurisdiction where there is no evidence that discrimination is a problem. Nebraska clearly could not adopt its own race-based state DBE program as a remedy for discrimination without evidence of discrimination in Nebraska. How then can DOT require Nebraska to have such a program when the federal government also lacks evidence of discrimination in the state?

The federal respondents note (Fed. Opp. 7) that, in setting an annual goal for DBE participation, DOT's regulations instruct states that the goal "must reflect your determination of the level of DBE participation you would expect absent the effects of discrimination." 49 C.F.R. § 26.45(b). But calculating the level of DBE participation there would be in a hypothetical world absent the effects of historic discrimination is at best an exercise in speculation and at worst an impossible task. It is anyone's guess how Nebraska would have arrived at that number, particularly given the lack of any effort by anyone to identify or quantity such discrimination in the state.

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[4] The testimony of an NDOR official to the effect that "outside of the program the DBE community does not get as much work as they do when there are program goals" (Neb. Opp. 5) is not, as the Nebraska respondents contend, "an indication of some discrimination" (*id.*) against DBEs, but merely states the obvious—that DBE programs achieve their intended effect of funneling work to DBEs.

DOT's DBE regulations buckle under scrutiny for still another reason. The regulations confer the exact same preference upon, and draw no distinctions among, all six of the presumptively disadvantaged groups—"women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, [and] Subcontinent Asian Americans." 49 C.F.R. § 26.67(a)(1). But the discrimination faced by each of those groups is not, and has not been, the same. The history of discrimination against African Americans in this country is not the same as the history of discrimination against women or Native Americans. Yet the DOT regulations lump all six groups together as if there were no relevant differences among them and the prejudice they have experienced. Nor do the regulations account for regional differences. The preference for an Hispanic-owned firm is the same in California as it is in Connecticut. For these reasons, the regulations cannot be said to be narrowly tailored.

It should also be noted, and it is relevant to the strict scrutiny analysis, that the six groups eligible for TEA-21's 10% set aside together constitute a *majority* of the American population. This fact may cast doubt upon the purportedly remedial purpose of the program. *See Croson*, 488 U.S. at 495-496 ("heightened judicial scrutiny" of Richmond program "appropriate" since "blacks constitute approximately 50% of the population of the city of Richmond" and hold "[f]ive of the nine seats on the city council") (plurality opinion). TEA-21 is not a statute in which the majority, acting contrary to its self interest, has disadvantaged itself by adopting protections for the minority; rather, TEA-21 works to the benefit of groups representing a majority of American citizens and voters.

Finally, none of the evidence respondents cite explains why the TEA-21 set aside is set at 10%. The evidence provides no insight into how Congress arrived at that figure or why that amount is an appropriate remedy. To an onlooker, the 10% figure appears plucked from thin air. If the evidence

before Congress adequately supports a 10% set aside, it is hard to see why it would not also support a 20%, 30%, or even greater set aside.

3. Pointing to the Eighth Circuit's statement that it took a "hard look" at the evidence (Pet. App. 7a), the federal respondents argue that the first question presented in *Adarand II*—*i.e.*, whether the Tenth Circuit misapplied strict scrutiny in that case—is not presented in this case. Fed. Opp. 27-28. Indeed, both respondents repeatedly quote the Eighth Circuit's "hard look" statement, as if merely by saying it looked hard, *ipso facto*, the court applied the proper scrutiny. Fed. Opp. at 12, 17, 18, 28; Neb. Opp. 3, 10. But the Constitution requires more than verbal assurances. Just because the Eighth Circuit *said* it took a hard look does not mean it actually applied strict scrutiny in the correct manner. The Tenth Circuit in *Adarand II* also said that it was applying strict scrutiny, but this Court granted the writ to determine whether in fact it had done so. *See Adarand Constructors, Inc.* v. *Slater*, 228 F.3d 1147, 1155 (10th Cir. 2000) ("Our evaluation of the * * * program utilizes the 'strict scrutiny' standard of constitutional review enunciated by the Supreme Court in an earlier decision in this case."), *cert. granted*, 532 U.S. 967 (granting review on the question "[w]hether the court of appeals misapplied the strict scrutiny standard in determining if Congress had a compelling interest to enact legislation designed to remedy the effects of racial discrimination."), *writ dismissed*, 534 U.S. 103 (2001).

4. Respondents urge the Court to deny review for want of a circuit split. Fed. Opp. 16, 21; Neb. Opp. 9-12. As shown in the petition, however, the decision below is at odds with *Rothe Development Corp.* v. *United States Department of Defense*, 262 F.3d 1306 (Fed. Cir. 2001). Pet. 23-25. Like this case, *Rothe* involved an equal protection challenge to a racially discriminatory federal contracting preference. It is clear, moreover, that if the Eighth Circuit in this case had applied the same level of scrutiny applied by the Federal

Circuit in *Rothe* the outcome of this case would have been different. For example, in reversing the District Court, the Federal Circuit in *Rothe* faulted the lower court for failing to "determine whether evidence of discrimination [was] sufficiently pervasive across racial lines to justify granting a preference to all five purportedly disadvantaged groups included under the * * * program." *Rothe*, 262 F.3d at 1330. Here, of course, the District Court did not consider the sufficiency of the evidence supporting preferences as to each of the six groups favored under the DOT regulations. Nor did the Eighth Circuit require the District Court to do so. The stark inconsistency between the decision below and *Rothe* warrants review.

In addition, in *Adarand II* this Court granted certiorari, not to resolve any circuit split, but rather "to review for a second time whether the Court of Appeals was correct when it concluded that the [DOT DBE] program is consistent with the constitutional guaranty of equal protection." *Adarand* v. *Mineta*, 534 U.S. at 105. That is the same question "of fundamental national importance" (*id.* at 110) presented in this case, and that question warrants this Court's review even in the absence of a circuit split, just as it did in *Adarand II*. Even without a circuit conflict, this Court has granted the writ based upon the high importance of the question presented. *See, e.g.*, *PhRMA* v. *Walsh*, 123 S. Ct. 1855, 1860 (2003) ("[W]e granted certiorari because the questions presented are of national importance.").

The federal respondents state that review is not warranted because two federal courts of appeals and five district courts have rejected challenges to TEA-21. Fed. Opp. 16, 21. Once unpacked, however, those figures lose their punch. The two circuit court cases consist of *Adarand II*—in which this Court granted certiorari—and this case—in which petitioner seeks certiorari. And the five district court cases consist of the Colorado case appealed to the Tenth Circuit in *Adarand II*; the Nebraska and Minnesota cases appealed to the Eighth

Circuit in this case; a Washington case now on appeal; and an Illinois case in which the time to appeal has not run.

5. The Nebraska respondents point out that the DBE program is in the process of reauthorization. Neb. Opp. 6-8. But as the federal respondents correctly observe, both the Senate and House of Representatives have passed bills containing identical language reauthorizing TEA-21's race- and gender-based 10% set aside. Fed. Opp. 3 n.2. Thus, given the near certainty that the set aside will be reauthorized, the upcoming expiration of TEA-21 (which, after two extensions, is now set to occur on April 30, 2004) is not a reason to deny the writ. *Cf. Adarand Constructors, Inc.* v. *Slater*, 528 U.S. 216, 224 (2000) (per curiam) ("Because, under the circumstances of this case, it is impossible to conclude that respondents have borne their burden of establishing that it 'is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur,' petitioner's cause of action remains alive.") (quoting *Friends of the Earth, Inc.* v. *Laidlaw Envt'l Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000)). For their part, the federal respondents do not cite the reauthorization of TEA-21 as a reason to deny the writ. And neither the federal nor Nebraska respondents indicate in their oppositions that they are preparing to suspend their DBE programs at the end of this month.

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For the foregoing reasons, as well as those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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